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REPORT
101-532

VISUAL POLLUTION CONTROL ACT OF 1990

OCTOBER 16 (legislative day, OCTOBER 2), 1990.—Ordered to be printed

Mr. BURDICK, from the Committee on Environment and Public Works, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 2500]

The Committee on Environment and Public Works, to which was referred the bill (S. 2500) to amend title 23, United States Code, to control billboard advertising adjacent to Interstate Federal-aid primary highways, and for other purposes having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

GENERAL STATEMENT

On September 25, 1990, The Committee on Environment and Public Works reported S. 2500 by a vote of 11-4. S. 2500 amends the Highway Beautification Act of 1965, which established a national policy for the control of outdoor advertising along federally funded Interstate and Primary highways.

S. 2500 makes two major changes to the Highway Beautification Act (HBA). It restores to the States and localities the option of using amortization to enforce zoning restrictions on billboards, and it places a moratorium on the construction of new billboards on the Federal-aid Interstate and Primary highway systems.

The bill restores to the States and localities the choice of providing cash payments for removing nonconforming billboards; providing amortization to remove nonconforming billboards; or doing nothing about nonconforming billboards. The ability of State and

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local governments to use amortization to remove nonconforming billboards was severely curtailed by an amendment to the HBA agreed to in 1978. This amendment stipulated that if a State or locality removed nonconforming billboards without making cash payments, the State would be subject to losing 10 percent of its Federal-aid highway apportionments.

Since enactment of the Highway Beautification Act in 1965, significant debate and judicial review of billboard regulatory requirements have focused on the issue of cash payments versus amortization. The Federal cash payment requirement has significantly contributed to the widespread failure to achieve the Act's billboard removal goals. Although only a grant condition to Federal-aid highway apportionments, the Federal cash payment requirement in effect preempted traditional and lawful State police power to control land uses. The 1978 amendment to the Act (section 122 of the Surface Transportation Assistance Act of 1978, Public Law 95-599, 92 Stat. 2700) which added the phrase "whether or not removed pursuant to or because of this section" to section 131(g) of title 23, further intruded upon traditional State police power in this area. The 1978 amendment required States and localities to make cash payments when a billboard on the Interstate or primary system is removed for any reason, whether pursuant to the HBA or State or local ordinances. If nonconforming billboards were removed without cash payments, States were subject to a financial penalty of ten percent of their entire annual Federal-aid highway apportionment. Prior to 1978, the cash payment requirement applied only if the billboard was removed pursuant to the federal HBA.

A substantial body of case law has upheld the use of amortization as a valid, constitutionally permitted alternative to cash payments as long as the particular amortization scheme is reasonable. Whether a particular ordinance is reasonable is normally a question of State law. Similarly, the point at which a "regulation" becomes a "taking" of property is almost always a question of State law. Since the Fifth Amendment's prohibition against the taking of private property for the public use without just compensation has been incorporated into the Fourteenth Amendment and is therefore binding on State and local governments, the Federal cash payment requirement contained in the HBA is unnecessary. State law can be relied on to protect any property rights of sign or sign site owners.

Courts have consistently refused to overturn amortization schemes challenged on Fifth Amendment taking or on equal protection grounds. The Highway Beautification Act's existing cash payment requirement has, in effect, provided the billboard industry with a unique exemption from the exercise of State police power and has cost taxpayers millions of dollars to remove signs that could have been lawfully removed by other means. Over the last several years numerous cities across the country have experienced the frustration of having amortization ordinances upheld in court only to find that enforcement of the ordinances on the Primary and Interstate Systems would subject the State to the sanction of decreased Federal highway funds, required by the Highway Beautification Act. With the cash cost to remove the remaining nonconforming billboards estimated at over $1 billion, it is imperative

that States and localities not be preempted by Federal law from using amortization as a means of compensating for billboard removals.

Following is a legal opinion issued in 1986 by the Department of Transportation General Counsel discussing the issue of amortization.

OPINION OF JIM J. MARQUEZ, GENERAL COUNSEL, U.S. DEPARTMENT OF TRANSPORTATION, WHETHER A PROVISION ALLOWING STATES TO PERMIT NONCONFORMING SIGN REMOVAL BY AMORTIZATION RATHER THAN MONETARY COMPENSATION IS CONSTITUTIONAL

Question. Whether an amendment to title 23, United States Code, to permit States and localities to remove highway signs by means of amortization and without monetary compensation raises constitutional problems on Fifth Amendment "taking" or equal protection grounds.

Answer. Based on the following discussion, I conclude that a provision allowing nonconforming highway signs to be removed through amortization is not constitutionally vulnerable.

DISCUSSION

I. BACKGROUND AND PRESENTATION OF ISSUES

The Highway Beautification Act of 1965, Pub. L. No. 89-285, 79 Stat. 1028, as amended (codified at 23 U.S.C. §§ 131, 136 and 319), established a scheme for control by the States of the erection and maintenance of outdoor advertising signs adjacent to the Interstate and primary highways. A State's failure to provide for "effective control," within the meaning of 23 U.S.C. § 131(c), of such signs may result in a ten percent reduction in its annual apportionment of Federal-aid highway funds. 23 U.S.C. § 131(b).

In general, the Highway Beautification Act does not require States to remove all existing signs or prohibit the erection of all new ones. Classes of signs not subject to the States' "effective control" include on-premises signs, directional and official signs and notices and signs in zoned and unzoned industrial and commercial areas that meet State requirements as to size, lighting and space. With regard to nonexempted signs, States are required to remove existing ones and prohibit the erection of new ones. Under 23 U.S.C. § 131(g), sign and site owners must be paid compensation for the removal of "nonconforming"[1] signs that do not comply with State laws passed for purposes of complying with the Highway Beautification Act. An extended discussion of the compensation provisions of the Highway Beautification Act is included below.

Since the Supreme Court decision approving the validity of zoning ordinances, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), the elimination of nonconforming

[1] Under zoning principles, a "nonconforming use" is one which lawfully existed prior to the enactment of a zoning or land use restriction and which may be maintained after the effective date of the restriction although it does not comply with the restriction. 82 Am. Jur. 2d Zoning and Planning § 178 (1976).

uses through amortization [2] has been the subject of frequent judicial scrutiny in the face of constitutional challenges to such practices. Such challenges typically attack amortization schemes on the grounds that they constitute a taking under the Fifth and Fourteenth Amendments of the United States Constitution [3] or violate the equal protection clause of the Fourteenth Amendment, at least in those instances where the owner of a nonconforming use can point to another Federal, State or local requirement that classifies another owner in such a manner so that the latter is entitled to compensation.

It is well-established that the Highway Beautification Act does not provide a private right of action for just compensation. *See, e.g., National Advertising Co.* v. *City of Ashland, Ore.*, 678 F.2d 106, 109 (9th Cir. 1982); *State* v. *National Advertising Co.*, 409 A.2d 1277, 1280 (Me. 1979); *R.O. Givens* v. *Town of Nags Head*, 58 N.C. App. 697, 294 S.E.2d 388, 391-92 (1982), cert. denied, 307 N.C. 127, 297 S.E.2d 400. Thus, assuming an amendment to the Highway Beautification Act to allow amortization, a particular challenge to an amortization scheme must attack directly the State statute or local ordinance establishing the scheme rather than the Highway Beautification Act itself.

While there could be wide variation in the substance or application of such State or local amortization provisions, nonetheless sufficient insight can be gleaned from the numerous cases in which plaintiffs have challenged the uncompensated removal of their signs. Also, the issue of compensation was an important one to the Congress in considering legislation culminating in the Highway Beautification Act of 1965 and subsequent amendments in 1978. Thus, the structure of the Act itself, relevant legislative history, and subsequent case law shed important light on the constitutional aspects of the compensation vs. amortization issue.

II. THE HIGHWAY BEAUTIFICATION ACT

A. The 1965 act

The Administration's bill (S. 2084), as originally introduced in May 1965, did not require compensation but rather authorized the use of States' police power to control billboards.[4] The Senate Public Works Committee rejected this approach and then added a compensation provision. Evident in the reports on the legislation was

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[2] Amortization provisions are those which require the termination of nonconforming uses at the expiration of a predetermined period of time. Annot. 22 A.L.R.3d 1134, 1137 n.3 (1968). These provisions, typically, apply to classes of uses. In effect, the owner of the nonconforming use is granted a monopoly position during the amortization period to enable him at least theoretically to recoup his investment in the use. *City of Fayetteville* v. *McIlroy Bank and Trust Co.*, 278 Ark. 500, 647 S.W.2d 439, 441 (1983). In contrast to compensation provisions, which seek to eliminate a nonconforming use pursuant to a States' power of eminent domain, amortization provisions are invoked pursuant to the police power to remove such a use. *Donrey Communications Company, Inc.* v. *City of Fayetteville*, 280 Ark. 408, 660 S.W.2d 900, 905 (1983), cert. denied 466 U.S. 959, 104 S.Ct. 2172, 890 L.Ed.2d 555 (1984). For further discussion of the breadth of States' police power, see discussion in Section II. D. of text, infra.

[3] The Fifth Amendment provides that "private property" shall not be taken for public use, without just compensation." Also, the Fifth Amendment has been incorporated into the Fourteenth Amendment and is, therefore, binding on State and local governments. *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L. Ed.2d 631 (1978).

[4] 111 Cong. Rec. 22949 (daily ed. Sept. 14, 1965) (statement of Sen. Cooper). *See also* 42 Op. Att'y Gen. 331, 333 (1966).

strong Congressional sentiment in favor of compensation. Thus, the House Public Works Committee indicated that it:

> Feels strongly that in all equity and fairness, compensation must be paid to those individuals who will lose their signs.

H.R. Rep. No. 1084, 89th Cong., 1st Sess. 7 (1965).

The Senate Public Works Committee also stated unequivocally its views with respect to States' use of their police power to remove nonconforming uses by amortization:

> The committee emphatically and unanimously rejects the use of police power in acquiring these rights, and has provided for the use of Federal funds for paying the Federal pro rata share of the acquisition costs . . . . Such payment is mandatory, not permissive on the States.

S. Rep. No. 709, 89th Cong., 1st Sess. 7 (1965) (emphasis added).

In addition, during floor debate in the Senate, Senator Dirksen was successful in adding an amendment for the purpose of making it clear that it was the congressional policy to require the payment of compensation rather than to permit the States to rely on their police power to exercise "effective control" over nonconforming billboards.[5] The amendment, as enacted, read:

> Nothing in this Act or the amendments made by the Act shall be construed to authorize private property to be taken or the reasonable and existing use restricted by such taking without just compensation as provided in this Act.

Highway Beautification Act of 1965, Pub. L. No. 89-285, tit. IV, § 401, 79 Stat. 1033.

In introducing the amendment, Senator Dirksen offered the view that the proposed section ". . . is a restatement of the principles laid down in article V of the Bill of Rights in the Constitution." [6]

Although the above pronouncements appear to suggest that States are prohibited from exercising their police power to remove billboards but must provide compensation, there is significant support, as discussed below, for the view that the prohibition should not be construed in constitutional terms.

B. 1966 Attorney General's opinion

In response to a request from the Secretary of Commerce (who enforced the Highway Beautification Act's provisions prior to the establishment of the Department of Transportation), the Attorney General addressed the question whether "the words 'just compensation' and 'taking' in section 131(g) are to be read as words of art referring to the payments required of the Federal and State governments by the Fifth or Fourteenth Amendments when private property is taken for public use." [7]

The Attorney General concluded that "Congress did not have strict constitutional usage in mind when it enacted section 131(g).[8]

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[5] Cunningham, "Billboard Control Under the Highway Beautification Act of 1965," 71 Mich. L. Rev. 1296, 1311-12 (1973).

[6] 111 Cong. Rec. 24126 (1965).

[7] 42 Op. Att'y Gen., *supra* note 4, at 331.

[8] *Id.*

Rather, section 131(g) was designed to insure payment in each case of a billboard abatement covered by that section, whether or not compelled by the Constitution. It obviously employed the term 'just compensation' to set the standard for ascertaining the amount of payment.[9]

Thus, even though a State could rely on the police power to implement the Highway Beautification Act, section 131(g) requires it to provide compensation in order to receive a full allocation of highway funds.[10] The Attorney General also saw no constitutional problem with the Federal government's providing an "inducement" [11] to the States to provide for compensation of persons. The opinion reviewed Supreme Court decisions on grants-in-aid,[12] which have consistently upheld statutes setting conditions upon the States incident to receiving grants.[13] These precedents provided adequate grounds for the Attorney General to conclude that the Federal government may require a State to comply with certain conditions in order to obtain funds that the Federal government grants to the States.[14]

A leading commentator [15] on the Highway Beautification Act has also construed section 131(g) as not going so far as to require States to compensate as a matter of constitutional principle. In examining the legislative history, he concluded that the compensation requirement is mandatory on the States only if they seek to avoid the 10 percent penalty.[16]

> There is nothing in the hearings to indicate that the subcommittee members [considering the proposed Highway Beautification legislation] intended to forbid absolutely the use of any state's police power to eliminate highway advertising signs, although it was clearly assumed that few, if any, states would be willing to suffer the 10 percent penalty in order to avoid payment of just compensation to sign owners and landowners. Consequently, the statement in the Senate committee report that '[s]uch payment is mandatory, not permissive, on the States' [17] and the statement in the House committee report that 'compensation must be paid to those individuals who will lose their signs' [18] must both be read as meaning that payment of just compensation is mandatory if, and only if, a state wishes to receive its full share of federal funds.[19]

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[9] *Id.*

[10] *Id.*

[11] *Id.* at 45.

[12] *Massachusetts* v. *Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923); *Oklahoma* v. *United States Civil Service Comm'n*, 330 U.S. 127, 67 S.Ct. 554, 91 L.Ed. 794 (1947); *United States* v. *Darby*, 312 U.S. 100, 124, 61 S.Ct. 451, 462; 85 L.Ed. 609, 622-23 (1941).

[13] The Supreme Court has upheld requirements imposed by grant-in-aid statutes where considered an appropriate means and plainly adapted to the permitted end and not arbitrary. *See* cases cited in previous note.

[14] For an articulation of these principles in the billboard regulation area, *see South Dakota* v. *Adams*, 506 F. Supp. 50, 54 (D.S.D. 1980), aff'd sub. nom *South Dakota* v. *Goldschmidt*, 635 F. 2d 698 (8th Cir.), cert. denied, 451 U.S. 984, 101 S.Ct. 2316, 68 L.Ed.2d 841 (1981).

[15] Cunningham, *supra* note 5.

[16] *Id.* at 1317.

[17] S. Rep. No. 709, 89th Cong., 1st Sess. 7 (1965).

[18] H.R. Rep. No. 1084, 89th Cong., 1st Sess. 7 (1965).

[19] Cunningham, *supra* note 5 at 1317.

The commentator also concluded that the floor amendment by Senator Dirksen that became section 401 of the Highway Beautification Act was added for the express purpose of making it absolutely clear that it was congressional policy to encourage the payment of compensation rather than to enable the States to rely on their police power to remove nonconforming signs [20] (emphasis added). He also concluded that Senator Dirksen's statement (at 111 Cong. Rec. 24126 (1965), quoted above) should not be given much weight.[21]

The view that the Highway Beautification Act's compensation requirement is not mandated by the Constitution has received extensive case law support, as will be discussed below.

C. The 1978 amendments

In response to billboard industry concerns over an interpretation of the Highway Beautification Act by the Federal Highway Administration (FHWA), the Congress amended the Act's "just compensation" provision in the Surface Transportation Assistance Act of 1978 (STAA), Pub. L. No. 95-599, 92 Stat. 2701, § 122.

An FHWA legal opinion, dated March 12, 1976, concluded that section 131(g)'s "just compensation" provision did not reach billboard removals where such removals were unrelated to the Federal Act. Thus, a State could not be penalized for failure to comply with the requirements of the Highway Beautification Act where a locality, by legal zoning ordinances, provides for the removal of lawfully erected signs by means of amortization.

Partially in response to this reading of the Highway Beautification Act, the Congress amended section 131(g) to require that compensation be paid upon removal of a legally erected sign adjacent to a Federal-aid primary or Interstate highway, even though the removal may be for a purpose unrelated to State beautification laws or 23 U.S.C. § 131. Although the proposed legislation was enacted without the benefit of any hearings and with little discussion during mark-up, the House report on the proposed STAA [22] makes clear that the revised language in section 131(g) was to "clarify existing law." [23] In addition, the limited floor debate on the "just compensation" amendment [24] is cast in terms of Congressional intent in originally enacting the 1965 Highway Beautification Act and does not reach the constitutional dimensions of the issue.

D. Case law

In the billboard regulation area, a sign or site owner's property rights are established under State law. As noted earlier, there is extensive case law support for the view that the Constitution does not require payment of compensation to a billboard or site owner. In general, a State or locality may exercise authority over private property by means of regulation of the use of land pursuant to its police power or a "taking" of property pursuant to its power of eminent domain. *Modjeska Sign Studio, Inc.* v. *Berle,* 43 N.Y.2d

[20] *Id.* at 1311-12.
[21] *Id.* at 1313 n.68.
[22] H.R. Rep. No. 1485, 95th Cong., 2d Sess. 14-17 (1978).
[23] *Id.* at 14.
[24] 124 Cong. Rec. 31063-31066 (1978).

468, 473-74, 402 N.Y.S.2d 359, 363, 373 N.E.2d 255, 258 (1977), appeal dismissed, 429, U.S. 809, 99 S.Ct. 66, 58 L.Ed.2d 101 (1978). The Supreme Court has addressed the issue on several occasions and has not required compensation even where the regulation results in a diminution in the value of particular property so long as the restriction advances legitimate State interests. *See, Agins* v. *City of Tiburon*, 447 U.S. 255, 261-62, 100 S.Ct. 2138, 2141-42, 65 L.Ed.2d 106, 112-13 (1980); *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104. 138 n.36, 98 S.Ct. 2646, 2666, 57 L.Ed.2d 631, 657 (1978).

An early court opinion rejected the view that the Constitution mandates payment of compensation to property owners upon removal of billboards and indicated that the purpose of the Highway Beautification Act of 1965 was clearly to induce States to act and should not be considered as mandatory. *Markham Advertising Co.* v. *Washington*, 73 Wash.2d 405, 439 P.2d 248 (1968), appeal dismissed for want of a substantial Federal question, 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed.2d 512,[25] reh'g denied, 393 U.S. 1112, 89 S.Ct. 854, 21 L.Ed.2d 813 (1969). The *Markham* court reasoned that if the Congress had intended the provisions of 23 U.S.C. § 131 to be mandatory on the States, there would have been no need for it to establish a monetary penalty for noncompliance. 439 P.2d at 257. *See also, South Dakota* v. *Volpe*, 353 F. Supp. 335, 337 (D.S.D. 1973); *National Advertising Co.* v. *City of Ashland, Ore., supra*, 678 F.2d at 106, 108 (9th Cir. 1982; *Vermont* v. *Brinegar*, 379 F. Supp. 606 (D. Vt. 1974); *South Dakota* v. *Adams*, 506 F. Supp. at 50, 58 (D.S.D. 1980) aff'd sub. nom. *South Dakota* v. *Goldschmidt*, 635 F.2d 698 (8th Cir.), cert. denied, 451 U.S. 984, 101 S.Ct. 2316, 68 L.Ed.2d 841 (1981); *Modjeska Sign Studios, Inc.* v. *Berle*, 55 A.D. 2d 340. 390 N.Y.S.2d 945, 947 (1977).

In general, the court decisions view amortization provisions applied to particular sign and site owners as constitutionally valid if they meet the test of reasonableness.[26] Courts have rejected constitutional challenges to amortization schemes if the period is "reasonably long enough to allow the sign owner to recoup his investment. . . ." *Lamar Advertising Associates of East Florida, Ltd.* v. *City of Daytona Beach*, 450 So.2d 1145, 1150 (Fla. Dist. App. 1984). Accord, *Fischer Buick, Inc.* v. *City of Fayetteville*, 286 Ark. 49, 689 S.W.2d 350, 351 (1985); *Mayor and Council of New Castle* v. *Rollins Outdoor Advertising*, 475 A.2d 355, 358-59 (Del. 1984); *Major Media of Southeast, Inc.* v. *City of Raleigh*, 621 F. Supp. 1446, 1452-53 (D.N.C. 1985). Factors that courts have relied upon in reviewing the reasonableness of amortization periods include: the cost of the billboard, its depreciation value and remaining useful life, the length and remaining term of the lease under which the sign is maintained and the harm to the public if the structure remains standing beyond the prescribed period. *Metromedia, Inc.* v. *City of San Diego*, 26 Cal.3d 848, 164 Cal. Rptr. 510, 610 P.2d 407, 428 (1980),[27]

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[25] The dismissal of an appeal by the Supreme Court is a ruling on the merits affirming the court below. *Hicks* v. *Miranda*, 422 U.S. 332, 343-44, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223, 235-36 (1975).

[26] Annot., 22 A.L.R.3d, *supra* note 2 at 1139.

[27] Under California law, "a city seeking to eliminate nonconforming uses may pursue two constitutionally equivalent alternatives: compensation or amortization. 610 P.2d at 426 (emphasis added).

rev'd on other grounds, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). *See also, Art Neon Co.* v. *City and County of Denver,* 488 F.2d 118 (10th Cir. 1973), cert denied, 417 U.S. 932, 94 S.Ct. 2644, 41 L.Ed.2d 236 (1974).

Where a sign owner can show that the loss he suffers is so substantial that it outweighs the public benefit associated with removal of the nonconforming use, then the amortization provision must be viewed as unreasonable. *Modjeska Sign Studio, Inc.* v. *Berle, supra,* 43 N.Y.2d at 480, 402 N.Y.S.2d at 367, 373 N.E.2d at 262; *Inhabitants, Town of Boothbay* v. *National Advertising Co.,* 347 A.2d 419, 424 (Me. 1975).

Thus, a one-year amortization period for removal of nonconforming uses was rejected as unreasonable as applied to billboards which had not yet been fully amortized under Internal Revenue Service rules. *National Advertising Co.* v. *County of Monterrey,* 1 Cal.3d 875, 83 Cal. Rptr. 577, 464, P.2d 33 (1970). Similarly, portions of a local ordinance providing different periods of amortization based on replacement value of the nonconforming sign were held invalid. *Art Neon* v. *Denver, supra,* 488 F.2d 118. But *see Metromedia, Inc.* v. *City of San Diego,* 23 Cal.3d 762, 154 Cal. Rpt. 212, 592 P.2d 728, 747 (1979), vacated, 26 Cal.3d 848, 164 Cal. Rptr. 510, 610, P.2d 407 (1980), *supra,* cert. denied, 453 U.S. 922, 101 S.Ct 3158, 69 L.Ed.2d 1004 (1981), holding that varying amortization periods in a local ordinance which ranged from one to four years, depending upon the depreciated value of the sign, was not unreasonable on its face.

In a handful of cases, plaintiffs have also attacked amortization provisions on the grounds that they unconstitutionally impair the obligation of contracts in violation of Article I, § 10 of the amortizaiton provisions invalidated on this basis. Rather, where a particular provision is viewed as a legitimate exercise of a State's or locality's police power, the fact that the performance of existing contracts may be frustrated is not constitutionally significant. *See, Temple Baptist Church* v. *City of Albuquerque,* 98 N.M. 138, 646 P.2d 565, 575 (1982); *Art Neon* v. *City and County of Denver, supra,* 488 F.2d at 123, quoting *Home Building and Loan Ass'n* v. *Blaisdell,* 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934); *Sign Supplies of Texas, Inc.* v. *McConn,* 517 F.Supp. 778, 784–85 (S.D. Texas 1980); *Hav-A-Tampa Cigar Co.* v. *Johnson,* 149 Fla. 148, 5 So.2d 433 (1941).

Although not all of the above cases dealt with local or State regulations of outdoor advertising also falling within the scope of the Highway Beautification Act, it is clear that the decisions specifically addressing the issue have failed to reject the amortization approach. *See, e.g., Modjeska Sign Studio, Inc.* v. *Berle, supra,* 390 N.Y.S.2d 945 (1977); *Newman Signs, Inc.* v. *Hjelle,* 268 N.W.2d 741, 758 (N.D. 1978), appeal dismissed, 440 U.S. 901, 99 S.Ct. 1205, 59 L.Ed. 2d 449 (1979). Other cases, relying on 23 U.S.C. § 131(o),[28] have upheld States' and localities' decisions not to require compensation when amortization programs were initiated in the absence of Federal removal funds. *See Metromedia, Inc.* v. *City of San Diego,*

[28] No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment.

supra, 610 P.2d at 426; *State* v. *National Advertising Co., supra,* 409 A.2d 1277 (Me. 1979).

Even those cases decided after the enactment of the 1978 amendments to the Highway Beautification Act have refused to read section 131(g), as amended, as requiring a municipality to pay compensation where a reasonable amortization period is provided in the removal ordinance. *See, e.g., Suffolk Outdoor Advertising* v. *Southampton,* 60 N.Y.2d 70, 468 N.Y.S.2d 450, 455 N.E.2d 1245 (1982), reargument denied, 61 N.Y.2d 670, 472 N.Y.S.2d 1028, 460 N.E.2d 232 (1983). Thus, the decision whether to require payment of compensation or accept a penalty raises statutory issues without constitutional overtones.

Although it may be difficult to envision with any degree of precision the exact contours of particular State or local regulation of outdoor signs that may give rise to an equal protection argument on the part of sign or site owners, a number of cases have addressed the issue under existing billboard control schemes. Typically, plaintiffs have made challenges on equal protection grounds where a State or locality has: 1. classified nonconforming signs as compensable or concompensable solely on the basis of the availability of Federal funds;[29] 2. determined that certain owners of signs or sites would not be entitled to compensation upon removal of the signs while other sign owners would be compensated (*i.e.*, signs not subject to "effective control" under the Highway Beautification Act and implementing State statutes);[30] or 3. permitted on-premises signs while controlling other commercial advertising.[31]

Under a straightforward equal protection analysis, a classification or distinction created by operation of a statute or ordinance will be sustained unless it engenders "invidious discrimination." *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563, 573 (1955).

At issue in billboard control is economic regulation as opposed to one involving a "suspect" classification or "fundamental" right. *Metromedia, Inc.* v. *City of San Diego, supra,* 592 P.2d at 745. The courts have placed reliance on the rules set out in *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911), in determining whether such economic regulation invities permissible or invidious discrimination. As indicated there:

> The rules by which this contention must be tested, as shown by repeated decisions of this court, are these: 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is

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[29] *State* v. *National Adviertising Co.,* 387 A.2d 745, 749 (1978); *Metromedia, Inc.* v. *City of San Diego, supra,* 610 P.2d at 426.

[30] *Ackerley Communications* v. *City of Seattle,* 92 Wash.2d 905, 602 P.2d 1177, 1187 (1979), appeal dismissed, 449 U.S. 804, 101 S.Ct. 49, 66 L.Ed.2d 7 (1980); *State* v. *Yard Birds, Inc.,* 9 Wash. App. 514, 513 P.2d 1030, 1035 (1973).

[31] *E.B. Elliott Advertising Co.* v. *Metropolitan Dade County,* 425 F.2d 1141 (5th Cir. 1979), cert. denied, 400 U.S. 805, 91 S.Ct. 12, 27 L.Ed.2d 35 (1980); *Newman Signs, Inc.* v. *Hjelle,* 268 N.W. 2d 741, 758–59 (N.D. 1978), appeal dismissed, 440 U.S. 901, 99 S.Ct. 1205, 59 L.Ed.2d 449 (1979); *Donnelly Advertising Corp.* v. *City of Baltimore,* 279 Md. 660, 370 A.2d 1127, 1133 (Md. App. 1975).

> purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

220 U.S. at 78–79, 31 S.Ct. at 340, 55 L.Ed. at 369.

Courts considering equal protection challenges to State and local billboard controls have had little difficulty in positing a set of circumstances justifying the particular regulation, finding the classification non-arbitrary and, therefore, sustaining the controls.[32]

In light of the legislative history of the Highway Beautification Act and the case law on the subject, it is clear that an amortization provision viewed as reasonable under the particular circumstances is constitutionally valid.

The second major provision of S. 2500 is a moratorium on the construction of new billboards on the Federal-aid Interstate and Primary highway systems. This is important in order to stop the rapid proliferation of billboards and assess how many billboards there are. It will give States and localities the time to assess their situtation; make decisions on the type of regulations they want to consider; and give local officials time to put new regulations in place, if they so desire, without pressure to put up new billboards. A moratorium costs taxpayers nothing; it affects no existing leases; and it increases the value of existing billboards.

Over 500 cities, counties and municipalities have already passed billboard bans or restrictions. Vermont, Maine, Hawaii, and Alaska have also banned billboards. These States made this decision before the 1978 amendments when they still had the tools to regulate billboards and implement their decision. Unfortunately, a State such as Rhode Island, which put in place a moratorium on the erection of new billboards since 1978, found that the Federal government has taken away the most effective tool States and localities had to regulate billboards—the option of using amortization. This bill restores that tool to State and local governments, and provides a moratorium on erecting new billboards on Primary and Interstate highways while States and localities make their decisions.

While both the Federal Highway Administration (FHWA) and the General Accounting Office (GAO) in their review of the program have stated that they are concerned about the reliability of much of the data regarding the number of billboards, FHWA statistics show that as of September 30, 1989, there are 33,836 illegal billboards still standing. GAO found that new billboards are going up at a much faster rate than nonconforming billboards are being removed. For example, the GAO found that in fiscal year 1983, 2,235 nonconforming billboards were removed while GAO estimat-

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[32] *See* cases cited in notes 29–31, *supra*.

ed from information provided to them by the States, that 13,522 new billboards were erected in 1983. FHWA data shows that 385 nonconforming signs were removed in 1989. They do not require States to provide information on the number of new signs erected each year. Since the 1978 amendment requiring cash payments as a condition of highway grants, the removal of nonconforming billboards has slowed significantly.

The General Accounting Office completed a comprehensive review of the Highway Beautification program in 1985, titled "The Outdoor Advertising Control Program Needs To Be Reassessed." The Department of Transportation's Office of Inspector General (OIG) has also studied the program. S. 2500 addresses several problems that were identified by these reports and witnesses who testified at Committee hearings during the last several years.

Current law requires States to remove illegal billboards and prohibits the erection of new illegal billboards. According to the GAO and OIG reports, the FHWA's oversight of State billboard-control programs has declined and FHWA has no program to ensure that State highway departments have a regular system for detecting newly-erected illegal signs. The reports further found that some States are not removing illegal signs expeditiously. GAO also found a number of instances where billboards that had been paid for were still standing. S. 2500 requires that States have an efective inventory to identify illegal billboards, and that once identified, illegal billboards must be removed within 90 days. The bill also requires that if billboard owners are compensated with cash, signs must be removed within 90 days of payment.

According to Federal regulations a nonconforming sign cannot be substantially altered. However, FHWA officials say the regulations do not prohibit nonconforming sign maintenance even if it results in increasing the billboard's value for compensation purposes. This has resulted in improvement of nonconforming billboards and in increased costs to taxpayers for removal. This bill prohibits the improvement of nonconforming billboards and permits only routine maintenance.

Both the GAO Report and the OIG Report cited problems with illegal cutting of vegetation to improve the visibility of billboards. Twenty-four States reported 253 instances of illegal vegetation or tree cutting during fiscal year 1983 on public rights-of-way in order to enhance the visibility of billboards. Often these trees and other types of vegetation have been purchased for landscaping with tax dollars. S. 2500 prohibits the cutting of vegetation or trees for the sole purpose of improving the visibility of a billboard.

The assertion has been made that billboards are primarily necessary to provide information to tourists. However, the majority of all billboards advertise products unrelated to tourism. There are numerous alternatives to billboards which can provide tourist information. These include the Logo sign program, information at tourist information centers or rest areas, uniform business signs on the right-of-way, printed tour guides, and on premise signs. With the emergence of intelligent vehicle systems or "smart cars" a whole new array of information technologies will be available.

Many of the States and communities most dependent on the tourist industry have banned or severely limited billboards because

they have found a billboard-free environment attracts tourists, businesses and homeowners. For example, a spokesman for the Vermont Travel Information Council stated, "Over the years the law has been in effect, it has gained he overwhelming support of the business community, notably those in travel related businesses such as hotels, motels, restaurants, sports facilities, etc."

Both the National League of Cities and the U.S. Conference of Mayors have endorsed this bill. Examples of other groups who support this legislation include the American Institute of Architects, the American Planning Association, The National Wildlife Federation and Scenic America.

Section-by-Section Analysis

Section 2.(a) amends section 131 of title 23 as follows:

Subsection (a)(1) amends section 131(b) of title 23 to make it clear that the Secretary's authority to penalize a State is discretionary. The penalty amount is changed from a fixed 10 percent to any amount the Secretary chooses between 0 and 5 percent. This change will make it possible for the Secretary to tailor the penalty to the severity of a State violation of the requirements in section 131. Minor departures from effective control can be dealt with less severely than major infractions. This penalty is in addition to the Secretary's general authority to withhold project approvals for failure to comply with statutory and regulatory requirements.

Section 131(c) of the current law defines "effective control" and prohibits all signs within certain limits along the Interstate and primary highway systems except for 5 expressly exempt categories of signs. Section 131(c) becomes 131(c)(1) and the five numbered exempt categories are redesignated as A through E.

Subsection (a)(2) amends section 131(c) of title 23 by adding four new requirements that are essential to effective control:

New section 131(c)(2) requires States to maintain an annual inventory of all signs required to be controlled. This inventory shall identify each sign as either illegal, nonconforming or conforming under State law.

New section 131(c)(3) requires States to remove signs promptly after the State law allows their removal. In the case of illegal signs, it is recognized that there may be a gap between the time a sign becomes illegal and the time it is identified as such by the State. The inventory system required by section 131(c)(2) should ensure that illegal signs are identified at least annually, and they should be removed within 90 days of the time they are identified. This section is also intended to ensure that signs are removed promptly after compensation has been paid or a reasonable amortization period has expired. Under existing law, which requires payments of cash for nonconforming signs, there have been instances in which signs were allowed to remain standing for years after the owner had been paid. This requirement should end such abuses.

Under section 131, as amended, a State or political subdivision of a State can use an amortization period to compensate sign owners. Sign owners may attempt to keep their signs up after the expiration of amortization ordinances by challenging the validity of such ordinances. The bill contemplates that signs will be removed

within 90 days of the first opportunity under State law. Thus, whenever permissible under State law, the State should remove signs subject to a challended ordinance at the expiration of the amortization period. If the ordinance ultimately is not upheld in litigation, the State may be directed to pay monetary compensation to the sign owner or re-erect the signs. On the other hand, this provison is not intended to require the removal of a nonconformintg sign is a State cannot remove such sign because of an injunction or other prohibition.

New section 131(c)(4) requires as part of effective control that the States refrain from and prohibit any vegetation clearance or alteration of the highway right-of-way for the purpose of improving visibility of outdoor advertising signs outside the right-of-way. States should make every effort to identify and prosecute those responsible for illegal vegetation clearance.

New section 131(c)(5) requires the States to prohibit any modification of nonconforming signs that would extend the useful life of such a sign or improve its visibility. This section is intended to prohibit modifications like the addition of lights which make a sign more visible and the replacement of wooden supports with metal ones that improve the useful life of a sign. Under current law, some States circumvent the extraordinary maintenance provisions by allowing replacement of up to 50 percent of a sign in any given year under the guise of routine maintenance, thus effectively allowing nonconforming signs to be completely rebuilt every two years. This section is intended to stop this practice.

Subsection (a)(3) of the bill amends section 131(d) of title 23. The current law allows signs to be erected and maintained in zoned and unzoned commercial and industrial areas in conformance with an agreement between the Secretary and each State. These agreements limit the size, lighting and spacing of permitted signs and define what constitutes an unzoned commercial or industrial area. The new section 131(d)(1) continues this control by agreement with some important limitations in section 131(d)(2).

Section 131(d)(2) of title 23 places a moratorium on the erection of any new, off-premise signs in commercial and industrial areas along Interstate and primary highways after October 1, 1990. Realizing that there will be a time lag until the States enact conforming legislation, this section requires the States to treat signs erected during this interim period as nonconforming.

Subsection (a)(4) of the bill amends section 131(e) of title 23 by eliminating the Federal requirement that lawful nonconforming signs be removed. Nonconforming signs that are lawfully in existence as of the effective date of this section may remain in place so long as they remain lawful. This section also makes clear that there is no Federal impediment to sign removal by the States. States may remove signs by any method and using any time available under State law.

This bill makes no change in section 131(f) of title 23 which provides authority for the information sign program that is carried out by the States within the highway right-or-way. This program, sometimes called the logo program, effectively provides the traveling public with information related to traveler-oriented services while not impairing highway safety or scenic beauty. States should

use this program as an alternative to billboards beyond the right-of-way. The amendment also retains section 131(i) of title 23, which permits information centers and systems to be located within the right-of-way.

Subsection (a)(5) rewrites section 131(g). The new section eliminates the existing requirement that the owner of a nonconforming sign and the owner of the real property on which a sign is located be paid compensation in cash when a sign is removed. This amendment permits sign removal by any method allowed by State law, including amortization, and thus places signs subject to control in accordance with the Act in the same category as other classes of land uses traditionally subject to police power regulation.

Although States would not be required to remove nonconforming signs or to make cash payments if they do choose to remove them, amended section 131(g)(1)(A) authorizes Federal participation in State costs incurred for the physical removal of both illegal and nonconforming signs. Amended section 131(g)(1)(B) authorizes Federal participation in any compensation paid by the States to acquire nonconforming signs. This provision is based on the recognition that some States have changed their laws to require cash payments because of the current Federal law.

The terms "illegal" and "nonconforming" used throughout this bill are understood as defined in the Federal Highway Administration (FHWA) regulations on billboards, 23 CFR 750. The distinction is that nonconforming signs were legal when erected, but could no longer be legally erected in the same location because of changes in the law or land use. Illegal signs were either not legal when erected or if legally erected have become illegal as a result of noncompliance with requirements such as permits, lease terms, maintenance, etc. Nonconforming signs that lose their nonconforming status through a volitional act of the sign owner, such as failure to seek a permit, become illegal.

New paragraph 131(g)(2) makes Federal funds available for participation in State costs from the States' Interstate and primary system apportionment from the Highway Trust Fund. Section 118 of title 23 describes the availability of Federal funds. New paragraph 131(g)(2) makes the Federal share available for billboard projects under section 131 of title 23 the same as the Federal share in section 120 of title 23 for other highway projects, i.e., generally 75 percent for projects on the primary system and 90 percent for projects on the Interstate System.

New paragraph 131(g)(3) provides that, for removal or acquisition of signs, displays or devices, a State may not use more than three percent of the Federal-aid Interstate and primary system funds apportioned in a fiscal year.

New paragraph 131(g)(4) prohibits States from disposing of any billboard sign acquired with Federal participation unless the State receives satisfactory written assurances that the material disposed of will never be used again for outdoor advertising. This requirement is included to stop the States from buying signs for fair market value and disposing of them by selling them back to billboard enterprises for a minimal salvage value only to have them re-erected elsewhere.

Subsection (a)(6) of the bill amends section 131(h) of title 23 by clarifying that the Federal agencies with jurisdiction or responsibility for public lands and reservations owned or controlled by the United States are responsible for controlling outdoor advertising on their respective lands. Paragraph 131(h)(2) is added to ensure that billboard practices on Federal lands and reservations are controlled by the appropriate Federal agency and that the controls are consistent with the laws of the State in which such land is located. Indian lands and Indian reservations which are now subject to control through the Bureau of Indian Affairs, are expressly excluded from the controls.

Paragraph 131(h)(2) also requires each Federal agency affected to adopt billboard regulations that are consistent with the stricter of the requirements of section 131 of title 23 or the State in which the land is located. These regulations must be developed in consultation with the Secretary and promulgated within one year of the effective date of this Act.

This section does not affect the Bonus Program in existing section 131(j).

Subsection (a)(7) of the bill amends section 131(k) of title 23 by deleting the reference to the just compensation requirement in section 131(g) that was repealed by this Act. The States' authority to promulgate stricter laws regarding billboards than the Federal grant conditions in section 131 of title 23 is retained.

Subsection (a)(8) of the bill repeals section 131(n) of title 23, which exempted States from the requirement to remove nonconforming signs if Federal funds are not available for sign removal. Since States will no longer be required to remove nonconforming signs and Federal funds are available from the Highway Trust Fund for States that choose to use their apportionment to pay compensation, this provision is no longer necessary.

Subsection (a)(8) of the bill also repeals section 131(p) of title 23. Since the requirement to remove nonconforming signs is eliminated, this section is unnecessary.

Subsection (b) of the bill requires the Department of Transportation to promulgate implementing uniform national regulations within one year of enactment of this Act.

Subsection (c) of the bill makes these amendments applicable to the States on the date of enactment of this Act. If a State cannot implement the amendments without legislation by this date, the State is required to implement them no later than the end of the first regular State legislative session held after the date of enactment of this section.

HEARINGS

While the Committee has not held hearings specifically on S. 2500, the Committee did receive testimony from witnesses on a similar proposal and on the issues addressed in this bill. This testimony was received in general hearings on the reauthorization of the Federal-aid highway program on July 11, 18, and 31, 1985.

ROLLCALL VOTES DURING COMMITTEE CONSIDERATION

During consideration of this bill by the Committee on Environment and Public Works, one rollcall vote was taken. In accordance with section 7(b) of rule XXVI of the Standing Rules of the Senate and the Committee on Environment and Public Works, this vote is recorded below.

Senator Moynihan moved adoption of the bill. The motion carried by a vote of 11-4. In support were Senators Baucus, Chafee, Durenberger, Graham, Humphrey, Jeffords, Lautenberg, Lieberman, Metzenbaum, Moynihan, and Warner. In opposition were Senators Burdick Reid, Simpson and Symms.

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Control Act requires each report to contain a statement of the cost of the reported bill prepared by the Congressional Budget Office. That statement follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 5, 1990.

Hon. QUENTIN N. BURDICK,
Chairman, Committee on Environment and Public Works,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2500, the Visual Pollution Control Act of 1990, as ordered reported by the Senate Committee on Environment and Public Works on September 25, 1990. Implementation of this bill would have no significant impact on the federal budget or on the budgets of state and local governments.

BILL PURPOSE

S. 2500 would make a number of changes to federal law governing control of billboards in areas adjacent to the federal-aid primary and interstate systems. Currently, federal law requires states to remove illegal and nonconforming signs and restrict the construction of new signs. Illegal signs are those erected after the existing law became effective, while nonconforming signs are those lawfully erected prior to that time. The law requires states to compensate owners of nonconforming signs prior to their removal and authorizes federal appropriations to cover 75 percent of this cost.

This bill would significantly alter these requirements. Under the amended program, states would be authorized, but not required, to remove nonconforming signs. Further, states would have the option of allowing amortization (removal of a billboard at the end of a set period of time) as an alternative to cash compensation. S. 2500 would allow states to use up to three percent of their annual apportionments of federal-aid interstate and primary funds to remove illegal and nonconforming signs and to compensate owners of nonconforming signs. Also included in S. 2500 are provisions that would establish explicit deadlines for removal of billboards prohibited under state law, prohibit states from taking actions to improve

visibility of billboards, and prohibit the erection of additional signs now allowed in commercial or industrial areas.

COST TO THE FEDERAL GOVERNMENT

S. 2500 would have no measurable impact on the federal budget. While the bill would authorize the use of federal-aid interstate and primary funds for billboard removal, it would not increase the total amounts available for these programs. The CBO baseline includes no future appropriations for billboard removal under current law, because no funds were appropriated for 1990.

COST TO STATE AND LOCAL GOVERNMENTS

The impact of this bill on state and local budgets is not likely to be significant. In recent years, states have not had to remove nonconforming billboards because no federal funds have been appropriated for this purpose. S. 2500 would provide states with a source of federal funds for billboard removal, but they would have to use funds that otherwise would be used for other projects, assuming no increase in the available amounts. Also, states would have to pay 10 percent or 25 percent of these costs depending on whether a billboard is adjacent to an interstate or primary highway. The bill also would require annual inventories of all billboards subject to control. This would involve some administrative expenses, but we would not expect the amount to be large.

Other provisions in the bill would reduce the cost of billboard control—particularly amendments making removal of nonconforming billboards discretionary and allowing amortization as an alternative to cash compensation. In addition, states would be able to use federal funds for the cost of physically removing illegal signs, which they cannot do under current law.

Finally, S. 2500 would change the sanctions faced by states that do not comply with federal requirements. Currently, the Department of Transportation is directed to reduce a noncomplying state's apportionment of federal-aid interstate and primary funds by ten percent. This bill would make the application of sanctions discretionary and would provide for a reduction in apportionments of up to five percent. CBO cannot predict whether states will comply with these new requirements or whether DOT would choose to apply sanctions to states that do not comply. Under the existing provision, however, no state has been penalized in recent years.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Marjorie Miller, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER.
Director.

MINORITY VIEWS OF MESSRS. SYMMS AND SIMPSON

Proponents of S. 2500 argue, and the majority report might lead one to believe, this bill is a states' rights bill. Indeed, it repeals the provision of the Highway Beautification Act that requires states to pay cash compensation for the removal of nonconforming signs. Thus, a State or local government, if not otherwise limited to cash compensation by its own statutory authority, would be able to amortize the value of those privately owned, nonconforming signs and take them, pursuant to federal law, without paying the owner a dime.

Nonconforming signs are not illegal signs. They are signs erected legally along the primary and interstate highways that subsequently become nonconforming because of a statutory or zoning change enacted pursuant to the Highway Beautification Act. They all have current legal permits. States are already required to remove illegal signs—those erected in violation of existing law or regulation—without compensation. Repeal of the Highway Beautification Act's cash compensation requirement affects only lawfully erected billboards. Should the same Federal law requiring the removal of that private property also allow States to take it without paying the owner? That's not States' rights; that's a usurpation of constitutionally protected private property rights in furtherance of a federally imposed regulatory scheme.

But repeal of the cash compensation requirement is the only provision of this entire bill that even hints at returning to the states the authority to control signs. Enactment of S. 2500 would require nearly every state in the country to make substantial statutory modifications to tighten controls on billboards. States that fail to enact conforming statutes will face the threatened loss of highway funds. Proponents of S. 2500 note the bill changes the Federal sanction against a noncompliant state from the current mandatory reduction of 10 percent of the State's Federal-aid interstate and primary funds to a discretionary reduction of up to 5 percent of those funds. Taken by itself, this provision would be a step in the right direction. Senators should be aware, however, that every state is in compliance with current law, while most States will face the renewed threat of funding reductions until conforming statutes are enacted if S. 2500 passes.

The bill would require States to prohibit the erection of any new billboards along the interstate and primary highways; prohibit any modification or maintenance of nonconforming signs that may extend the useful life of the sign; and prohibit the cutting of trees and vegetation to improve or maintain the visibility of signs. It is important to note that nothing in current law prevents states from enacting these billboard control measures. In fact, the majority report indicates four States have banned billboards entirely and hundreds of local governments have banned or restricted billboards

within their jurisdiction. But proponents of S. 2500 want to force the rest of the states to enact billboard controls they have not chosen and, perhaps, would not choose to enact on their own.

Substantively, the requirements of this legislation may not be desirable for a variety of reasons. For instance, many new businesses would be prevented from advertising to the traveling public, a revenue base on which many fledgling enterprises depend, because of the ban on new billboards. Second, the prohibition on maintenance of nonconforming billboards is obviously designed to eliminate by attrition the legally erected signs states have been unwilling or unable to remove with cash compensation. In the same vein, the ban on vegetation control necessary to maintain sign visibility will reduce or eliminate the value of a sign, again, without compensation to the owner. The same policy considerations that dictate against repeal of the cash compensation requirement should also move Senators to oppose these onerous dicta to the states.

In sum, far from returning regulatory authority to the states, S. 2500 is nothing short of a billboard opponent's dream come true. The bill reflects its proponents' observation that some State and local officials apparently view billboards as a legitimate part of the economic life of their communities, while others clearly wish to ban them entirely. S. 2500 would tighten the Federal regulatory requirements and make those "bad guys" in the former group shape up. At the same time, the "good guys" who want to take down existing billboards without paying the owners will have their opportunity because the bill removes the Federal obstacle in their path: namely, that they pay cash for taking private property.

This is bad public policy and an unnecessary modification of the Highway Beautification Act. In addition to the four states that have banned billboards entirely, there are numerous states that have a very effective sign control and removal program. Current law can and does work where states want to use it effectively. Congress need not and should not eliminate the cheapest and sometimes only effective means of communication for small businesses and, at the same time, put almost every state at risk of the loss of highway funds by enacting this dramatic modification of current law.

CHANGES IN EXISTING LAW

In compliance with section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows: Existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman:

TITLE 23—UNITED STATES CODE

CHAPTER 1.—FEDERAL-AID HIGHWAYS

* * * * * * *

§ 131. Control of outdoor advertising

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(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way [shall] *may* be reduced by amounts [equal to 10] *up to 5* per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. [Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.]

(c)*(1)* Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled

way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section be limited to [(1)] *(A)* directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, [(2)] *(B)* signs, displays, and devices advertising the sale or lease of property upon which they are located, [(3)] *(C)* signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, [(4)] *(D)* signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and [(5)] *(E)* signs, displays, and devices advertising the distribution by nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term "free coffee" shall include coffee for which a donation may be made, but is not required.

(2) As part of effective control, each State shall maintain an annual inventory of all outdoor advertising signs, displays, and devices required to be controlled pursuant to this section. Such inventory shall identify all such signs as either illegal, nonconforming, or conforming under State law.

(3) As part of effective control, each State shall assure that signs, displays, and devices required to be removed by this section shall be removed within ninety days of (A) the date upon which they become unlawful or if not unlawful the date upon which they must be removed pursuant to State or local law, or (B), if eligible to receive cash compensation pursuant to this section or to be amortized, the date upon which cash compensation is paid, or the State or local amortization period ends.

(4) As part of effective control, no State may allow or undertake any vegetation removal or other alteration of the highway right-of-way with the purpose of improving the visibility of any outdoor advertising sign, display or device located outside of the right-of-way.

(5) As part of effective control, no State may permit any person to modify any outdoor advertising sign, display, or device which does not conform to subsection (c) or (d) of this section to improve its visibility or to prolong its useful life.

(d)*(1)* In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or com-

mercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreements in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

(2) After October 1, 1990, no new signs, displays or devices may be erected under the authority of this subsection. Any sign, display or device lawfully erected under State law after October 1, 1990, and prior to the effective date of this section shall be treated as nonconforming.

[(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.]

(e) The Secretary shall not require a State to remove any lawfully erected sign, display, or device which does not conform to this section and is lawfully in existence on the date which this section becomes effective. Nothing in this subsection shall prevent a State from removing any sign, display or device.

* * * * * * *

[(g) Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section. The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

[(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

[(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.]

(g)(1) The Secretary may participate in the costs incurred by the State for the following:

(A) physically removing signs, displays, or devices that are located in areas required to be effectively controlled by this section and are illegal under State law or that are required by this section to be removed and that were lawfully erected and have been lawfully maintained under State law.

(B) acquiring signs, displays, or devices that are required by this section to be removed and that were lawfully erected and have been lawfully maintained under State law.

(2) Payments made to a State by the Secretary may be made for the removal or acquisition of signs, displays, and devices located in areas adjacent to the Federal-aid primary system and the Interstate System from funds apportioned to such State under section 104(b)(1) and 104(b)(5) of this title. For the removal or acquisition of signs, displays, or devices, the Federal share of any costs participated in under this subsection shall not exceed that set forth in section 120(a) for those adjacent to the Federal-aid primary system and that set forth in section 120(c) for those adjacent to the Interstate System.

(3) After September 30, 1990, a State may use to carry out this section in any fiscal year not to exceed 3 per centum of funds apportioned in such fiscal year to such State for the Federal-aid Interstate and Primary System.

(4) A sign, dislay, or device acquired with funds made available pursuant to this section may be disposed of by sale or other means to a private party only if the State receives satisfactory written assurances that the material will not be used to construct or reconstruct an outdoor advertising sign, display, or device.

(h)*(1)* All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

(2) No outdoor advertising sign, display, or device shall be permitted by any Federal agency on all public lands or reservations, excluding Indian lands and reservations, owned or controlled by the United States, unless such sign, display, or device conforms to regulations issued by the Federal agency with jurisdiction over, or responsibility for, such land. Such regulations shall be at least as stringent as the requirements of this section and the requirements of the State in which the land is located. The regulations required by this subsection shall be developed in consultation with the Secretary of Transportation and shall be promulgated within twelve months of the effective date of this Act.

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(k) [Subject to compliance with subsection (g) of this section for the payment of just compensation, nothing] *Nothing* in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.

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[(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment.]

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[(p) In the case of any sign, display, or device required to be removed under this section prior to the date of enactment of the Federal-Aid Highway Act of 1974, which sign, display, or device was after its removal lawfully relocated and which as a result of the amendments made to this section by such Act is requird to be removed, the United States shall pay 100 per centum of the just compensation for such removal (including all relocation costs).]

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